OKLAHOMA PETROLEUM MARKETERS ASSOCIATION et al., Appellants	:	Order Affirming Decision
MUSKOGEE COUNTY, OKLAHOMA, COMMISSIONERS, Appellants	:	Docket Nos. IBIA 00-9-A IBIA 00-16-A
v.	:	
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	December 26, 2000

These are appeals from a September 7, 1999, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), to take a five-acre tract of land in Muskogee County, Oklahoma, into trust for the Cherokee Nation of Oklahoma (Nation). For the reasons discussed below, the Board affirms the Area Director's decision.

The tract at issue here is located on U.S. Highway 62, approximately two miles south of Fort Gibson, Oklahoma, and within the exterior boundaries of the Nation's former reservation. 1/ In April 1996, the Nation submitted an application for trust acquisition of the tract,

1/ In his answer brief in this appeal, the Area Director states that the tract is located within territory annexed by the Town of Fort Gibson in December 1999, two months after the Area Director issued his decision. It does not appear that the Area Director sent a copy of his decision to the Town. However, the notice of appeal filed by the Muskogee County Commissioners shows that a copy was sent to the Town's attorney. Thus, it appears likely that the Town was made aware of the Area Director's decision.

Although the Town may not have been an interested party when the Area Director issued his decision, it has since become one. In order to give the Town an opportunity to participate in this appeal, without unduly delaying these proceedings, the Board authorizes it to file a petition for reconsideration of this decision under 43 C.F.R. § 4.315 if it wishes to make arguments other than those addressed in this decision.

which is owned in fee by Cherokee Nation Outpost, Inc., an enterprise of the Nation. On August 2, 1996, the Area Director issued a decision stating his intent to take the tract into trust. That decision was the subject of six appeals to the Board. On March 13, 1998, at the Area Director's request, the Board vacated his decision and remanded the matter to him for further review and issuance of a new decision. Chapman v. Muskogee Area Director, 32 IBIA 101 (1998). 2/

Following remand, the Nation, acting under its Self-Governance compact, 3/ contacted state and local officials to request updated information and additional comments on the Nation's trust acquisition application. After reviewing the responses and analyzing the Nation's application under the criteria in 25 C.F.R. § 151.10, the Area Director concluded that the application should be approved. By letters dated September 7, 1999, he conveyed his decision to the Muskogee County Commissioners, the Muskogee County Assessor, the Muskogee County Treasurer, and the Oklahoma Tax Commission.

Appeals were filed by the Oklahoma Petroleum Marketers Association et al. (Docket No. IBIA 00-9-A) 4/ and the Muskogee County Commissioners (Docket No. IBIA 00-16-A). The Appellants in both appeals elected not to file briefs. Accordingly, their appeals depend solely on the cursory contentions included in their notices of appeal.

The Area Director filed an answer brief in which, among other things, he challenged the standing of the Appellants in Docket No. IBIA 00-9-A. Appellants did not respond.

2/ Three other trust acquisition decisions were vacated in Chapman, also at the Area Director's request.

3/ Under its Self-Governance compact, the Nation performs BIA realty functions, as well as other functions formerly performed by BIA.

4/ In addition to the Oklahoma Petroleum Marketers Association, the Appellants in Docket No. IBIA 00-9-A are: Alan Chapman, Cake, Inc., and Chapman Oil Co., Inc.; Charlotte Chapman, J.W. Chapman and Chapman Oil Co., Inc.; Love's Country Stores; Chester Cadeaux, Mike Thornbrugh and Quick Trip; Danny Reese and Hit-N-Run, Inc.; Terry Bigby and Big B Food & Deli, Inc.; Roy D. Davis and Davis Oil Co.; Troy A. Lewis and T-N-T Grocery; Larry W. Cone and Quick Stop; David L. Wilson and Wilson Gas & Oil, Inc.; John Ritchie and Crowl Oil Co., Inc.; Ellen S. Rountree and Fuel Mart; J. Kent Rountree and Oklahoma Southern Transportation, Inc.; Ken Rountree and Rountree Properties; David R. Deaton and Four Mile Stop & Cafe; Stanley "Bud" Wilkinson and Hitchin Post; Glenn Smith; Ted Jones and Green Country Oil & Gas; Dale Marlar and M&M Minit Mart, Inc.; and Paul Neely and Jiffy Jon's Convenience Stores.

During the course of the proceedings in Chapman, the Board recognized that there was a question as to the standing of some of the appellants in that case)) that is, the individual and business appellants)) to challenge the trust acquisitions at issue there. Although the standing issue was briefed by the parties in Chapman, it was not addressed by the Board because of the remand made at the Area Director's request.

Since Chapman, the Board has received other appeals from non-governmental appellants who objected to trust acquisitions. See Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director, 34 IBIA 235 (2000); May v. Acting Phoenix Area Director, 33 IBIA 125 (1999). See also Big Lagoon Park Co., Inc. v. Acting Sacramento Area Director, 32 IBIA 309 (1998), concerning a request to rescind a trust acquisition. In Lake Montezuma Property Owners Association, Inc. and May, parallel appeals were filed by governmental entities with clear standing, eliminating any critical need to determine the standing of the non-governmental appellants. See May, 33 IBIA at 128. The appeal in Big Lagoon Park Co., Inc. was dismissed for lack of jurisdiction. 5/

It is arguable that, given the Area Director's direct challenge to the standing of the non-governmental appellants here, the Board should address the issue. However, as in Lake Montezuma Property Owners Association, Inc. and May, a parallel appeal has been filed here by a governmental entity with unquestioned standing. Further, the arguments made in the two appeals are virtually identical. Thus, the Board would be required to consider the same arguments on the merits even if it were to dismiss the appeal in Docket No. IBIA 00-9-A for lack of standing. Under these circumstances, the Board concludes that it is not necessary to determine the standing of the appellants in Docket No. IBIA 00-9-A. As it did in May, 33 IBIA at 134, the Board assumes, but does not decide, that the appellants in Docket No. IBIA 00-9-A have standing here.

In their notices of appeal, Appellants contend that the statutory authority relied upon by the Area Director for this trust acquisition, 25 U.S.C. § 465, is unconstitutional. For this contention, they cite South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996).

The Board has no authority to declare an act of Congress unconstitutional. E.g., Village of Ruidoso, New Mexico v. Albuquerque Area Director, 32 IBIA 130, 133 (1998), and cases cited therein. Accordingly, the Board lacks jurisdiction to address Appellants' contention that 25 U.S.C. § 465 is unconstitutional. 6/

5/ A pre-Chapman appeal was dismissed for lack of standing after the appellants, individuals who objected to a trust acquisition, failed to respond to a Board order to show their standing. Dudek v. Acting Assistant Portland Area Director, 23 IBIA 88 (1992).

6/ The Area Director points out that the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction the land at issue here is located, has explicitly disagreed with the

Next, Appellants contend that, "[e]ven if 25 U.S.C. § 465 is constitutional, this acquisition does not further the statutory purpose of 'providing land for Indians' because the Cherokee Nation already owns the subject property." 7/ Notice of Appeal in Docket No. IBIA 00-9-A at 2; Notice of Appeal in Docket No. IBIA 00-16-A at 3.

The regulations in 25 C.F.R. Part 151 specifically authorize the trust acquisition of land when the applicant already owns the land in fee. 25 C.F.R. § 151.4 provides: "Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner." Because the trust acquisition at issue here is explicitly authorized under this regulatory provision, Appellants' contention necessarily constitutes an assertion that 25 C.F.R. § 151.4 is inconsistent with 25 U.S.C. § 465.

The Board has no authority to disregard a duly promulgated regulation or to declare such a regulation invalid. E.g., Shoshone-Bannock Tribes v. Portland Area Director, 35 IBIA 242, 247 (2000), and cases cited therein. Accordingly, the Board lacks jurisdiction to address Appellants' implied contention that 25 C.F.R. § 151.4 is in conflict with 25 U.S.C. § 465.

Next, Appellants contend that the Nation will be both trustee and beneficiary of the property, that no actual trust services will be provided, and that there is no danger of improper alienation of the subject property if it is not taken into trust. It appears likely that the first two of these three contentions are based on the Nation's performance of BIA realty functions under its Self-Governance compact.

The fact that a tribe performs BIA realty functions under a Self-Governance compact does not diminish the trust responsibility of the United States for that tribe's trust land, even when the tribe provides BIA services to its own land. 25 U.S.C. § 458cc(b)(9). See also subsec. 203(4) of the Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa note. If the trust acquisition at issue here is completed, the United States will hold title to the property as trustee. The United States, not the Nation, will be the trustee, regardless of whether BIA or the Nation provides BIA realty services to the land.

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fn. 6 (continued)
Eighth Circuit's now-vacated holding in South Dakota and has found 25 U.S.C. § 465 to be constitutional. United States v. Roberts, 185 F.3d 1125, 1136-37 (10th Cir. 1999).

7/ 25 U.S.C. § 465 provides:

"The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."

The basis for Appellants' "improper alienation" contention is not immediately apparent. Appellants do not point to any statutory or regulatory requirement that land be in danger of improper alienation before it may be taken into trust. Nor do they show that such a danger is a factor to be considered under 25 C.F.R. § 151.10.

Appellants have not, in any of these three contentions, shown any legal impediment to the trust acquisition at issue here. Nor have they shown any improper exercise of discretion by BIA.

Appellants' remaining contentions concern the Area Director's exercise of discretion and his analysis of the Nation's trust acquisition request under the criteria in 20 C.F.R. § 151.10. Appellants contend that the Area Director abused his discretion and they disagree with his analysis concerning the Nation's use of the land, the impacts resulting from removal of the land from the tax rolls, and potential jurisdictional problems. 25 C.F.R. § 151.10(d), (e), (f). As was the case with their other contentions, Appellants fail to support these contentions with any argument or analysis.

The Board has often stated that a BIA decision to take land in trust is a decision based on the exercise of discretion and that an appellant who challenges such a decision bears the burden of proving that BIA did not properly exercise its discretion. E.g., May, supra, 33 IBIA at 130, and cases cited therein. An appellant's expression of disagreement with BIA's analysis is insufficient to show that BIA did not properly exercise its discretion. E.g., Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 44 (1999); Ziebach County, South Dakota v. Aberdeen Area Director, 33 IBIA 239, 242-44 (1999). This is particularly true when the appellant offers no support for the contentions on which its disagreement is based.

Appellant has failed to show that the Area Director improperly exercised his discretion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's September 7, 1999, decision is affirmed.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge